



STATE OF NEW JERSEY

In the Matter of C.H., Department of Corrections	:	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
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CSC Docket No. 2021-1378	:	
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	:	Reprisal Appeal
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ISSUED: JULY 26, 2021 (SLK)

C.H., a Senior Correctional Police Officer with the Department of Corrections (Corrections), represented by Tina M. James, Esq., petitions the Civil Service Commission (Commission) for relief, pursuant to *N.J.S.A. 11A:2-24* and *N.J.A.C. 4A:2-5.1*, from alleged reprisal.

By way of background, on September 8, 2020, C.H. filed a complaint with the Equal Employment Division (EED) describing alleged retaliatory conduct for whistleblowing regarding allegations that Corrections violated labor laws and engaged in various forms of unethical conduct. Further, on December 31, 2020, he filed a Special Custody Report which stemmed from two phone calls on that same date. Additionally, C.H. filed a complaint with the EED when he learned that he was being investigated for insubordination, which allegedly occurred during the second phone call on December 31, 2020. In response to its receipt of the Special Custody Report, the EED issued a February 22, 2021 letter determining that C.H.'s allegations did not touch the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy). In response to C.H.'s complaint regarding the December 31, 2020 phone call, the EED issued a March 5, 2021 letter indicating that the alleged conduct was not related to his membership in a protected class, and therefore, it was not opening an investigation under the State Policy. Thereafter, C.H. appealed to this agency, which responded that these allegations do not touch the State Policy, but that it would review the matter as an allegation of reprisal.

On appeal, C.H. acknowledges that the State Policy omits “whistleblowers” or “conscientious employees” as a protected category. However, he asserts that the EED’s decision denies him protections that he is entitled to receive under the State’s Conscientious Employee Protection Act (CEPA), *see N.J.S.A. 39:19-1, et seq.*, and the New Jersey Law Against Discrimination, *see N.J.S.A. 10:5-1, et seq.* Regarding C.H.’s first EED complaint, he presents that several years ago he reported labor violations and unethical conduct of Communications Officer R.S., which, after an investigation, led to R.S. being removed from his position, although he was subsequently reinstated. C.H. alleges that R.S. began harassing him upon his return, which led to C.H. filing the first EED complaint, and that investigation is ongoing. C.H. alleges that since R.S. returned to his position, he consistently assigns him to job posts that are perceived as less favorable, manipulates the schedule so that he is scheduled to work with officers R.S. perceives as less favorable, and R.S. would brag to other employees that he is manipulating the schedule against him. Further, C.H. alleges that R.S. would curse at other Communication Officers who impartially assigned him various job posts. Additionally, C.H. alleges that R.S. made false statements about him to other officers to turn them against him. He states that he informed his supervisors of this conduct, but the inappropriate conduct continues.

Concerning the Special Custody Report, the COVID-19 testing policy allows a supervisor to relieve an officer from his job post to get COVID-19 tested. However, C.H. presents that on December 22, 2020 and December 23, 2020, he was never relieved from his job post so he could not get tested. On December 31, 2020, C.H. called to receive his work assignment, but the Communications Officer who answered the phone responded with extreme hostility. Shortly thereafter, C.H. indicates that he received a phone call from a Sergeant who accused him of intentionally violating the COVID-19 testing policy and was threatened with a 14-day unpaid leave for failing to comply. In response, C.H. explained to the Sergeant that he was never relieved from his job post and the Sergeant insinuated that he should have abandoned his post to comply with the COVID-19 testing policy. C.H. then realized that he was being set-up by his Sergeant because he was being forced to either violate the COVID-19 testing policy or to abandon his post. Therefore, C.H. asserts that his action falls squarely within a protected class of employees. Further, he states that the individuals who were involved in the December 31, 2020 harassing conduct included individuals who were specifically named in his initial complaint to the EED or who were identified during the investigation. Therefore, to avoid being forced into a quarantine without pay, C.H. drove to work and completed his COVID-19 test. Thereafter, he filed a Special Custody Report regarding the harassing and retaliatory treatment that he received.

Regarding C.H.’s recent EED complaint, while the EED was reviewing his Special Custody Report, C.H. learned that Sergeant B. filed an incident report against him for insubordinate conduct. The claim was that Lieutenant O. overheard C.H. talking loudly to Sergeant B., and therefore, was insubordinate. While C.H.

acknowledges that he was frustrated for being threatened with unpaid leave and being accused with intentionally violating the COVID-19 testing policy, he asserts that he was respectful, never cursed, and specifically complied by immediately going for a COVID-19 test. He notes that he submitted a request for overtime for reporting to work to take the COVID-19 test, but it has been two months and he has not been paid, which forced him to file a grievance. Therefore, when C.H. learned of the investigation against him for purportedly being insubordinate, he filed the recent EED complaint, which noted that since there was a pending EED investigation, this complaint was for retaliation under the State Policy. However, C.H. argues that the EED improperly decided not to investigate his complaints by erroneously concluding that his complaints do not touch the State Policy or that there was an insufficient nexus between the conduct and his protected category.

C.H. presents that under CEPA, an employee is protected from retaliatory conduct or adverse employment actions because the employee disclosed, objected to or refused to participate in illegal actions or violate public policy. He indicates that his actions of reporting labor law violations, ethical violations, and refusing to leave his post fall under this protected class. C.H. contends that the retaliatory and harassing conduct towards him stems from reporting R.S.'s labor and ethical violation. He states that R.S. has exerted influence over others and the harassment is pervasive as multiple actors now harass him. Therefore, C.H. claims that the EED's conclusions and decision to not investigate ignores the protections afforded him under CEPA. He acknowledges that "conscientious employees" and "whistleblowers" are excluded from the State Policy as protected classes. However, C.H. reiterates that this does not negate the protections afforded him under CEPA. He contends that he should be protected for disclosing to his supervisors how their failure to comply with the COVID-19 testing policy, and their expectations that he leave his post to be tested without proper relief, violated another workplace policy.

C.H. asserts that once he disclosed this, he was retaliated against as his supervisor was not happy that he pointed this out and then filed for an investigation that he was insubordinate. He states that it is incredulous that the EED did not recognize the nexus between his complaints, the unfounded insubordination complaints filed against him, and the ongoing investigation. C.H. argues that these denials erode the protections of CEPA for Civil Service employees. Additionally, he argues that the State Policy unequivocally states that retaliation in the course of an investigation is prohibited. C.H. emphasizes his claim that he was subject to adverse consequences, including being set up to violate one of two policies, threatened with disciplinary action against him, threatened with being put on leave without pay for 14 days, and then having an investigation alleged insubordination undertaken. Further, even if the conduct does not rise to the legal definition of discrimination and harassment, C.H. believes that the EED should have recognized the nature of the retaliatory conduct against him for participating in an investigation and taken a "zero tolerance" stance against it, which it did not. He requests that the Commission take

action to stop the behavior and deter its reoccurrence, impose disciplinary and/or corrective action against those who engaged in retaliatory and harassing conduct, provide him compensation for overtime which has not been paid, and award damages for emotional distress, punitive damages, and recoupment of reasonable costs and fees, including attorney's fees.

In an additional submission, C.H. presents Corrections' Frequently Asked Questions regarding COVID-19 and Staff Testing Procedures. He highlights that the procedures indicate that custody staff will be relieved during shift to pick up their test kit. Therefore, in order for C.H. to be COVID-19 tested he must be relieved of his post. Accordingly, without him being relieved or having express verbal authorization to leave, he was unable to comply with the COVID-19 testing policy. He indicates that he was screamed and cursed at by the communications operator when calling for his shift and threatened with a 14-day unpaid leave for allegedly not complying with COVID-19 testing policy. However, when C.H. questioned why he was not provided with relief during his shift, he was investigated for being insubordinate. Further, he presents that on May 11, 2021, he received a Letter of Counseling. C.H. asserts that it is concerning that the Letter of Counseling is dated February 18, 2021, yet not presented to him until May, while this matter is being appealed. He also states that this letter is disingenuous in that it ignores Corrections' failure to provide him relief during his shift and its refusal to compensate him for returning to working during personal time to complete the COVID-19 test. C.H. claims that the letter is meant to cause a chilling effect on employees, such as himself, from speaking up when policies are not followed. Therefore, he also requests that this letter be removed from his file.

In response, Corrections, represented by El-Rhonda Williams Alston, Director, presents that during C.H.'s interview regarding the CEPA investigation, he stated that he did not file a written report regarding "labor violations, manipulation of the schedule and using favoritism to make scheduling assignments," but rather verbally shared this information with the Lieutenant. Additionally, the witness did not corroborate any of the allegations raised in his CEPA complaint. Corrections notes that it issued a CEPA policy which indicated that "Protection will be afforded only if the employee gives written notice to a supervisor of the alleged illegal activity and have given the employer a reasonable amount of time to correct the situation." It indicates that since there was no written report to substantiate an alleged illegal activity, noting that R.S. was removed from operations following C.H.'s "report," is immaterial as no written notice was submitted and no action is required by Corrections. Further, Corrections could not substantiate a violation of CEPA by R.S. as there was no evidence, including witnesses or documents which support the allegations. It notes that C.H. and a witness that he presented were interviewed.

CONCLUSION

N.J.A.C. 4A:7-3.1(a) states, in pertinent part, that the State of New Jersey is committed to providing every State employee and prospective State employee with a work environment free from prohibited discrimination or harassment. Under this policy, employment discrimination or harassment based upon certain specifically named protected categories are prohibited.

N.J.A.C. 4A:7-3.1(h) provides, in pertinent part, that retaliation against any employee who alleges that she or he was the victim of discrimination/harassment, provides information in the course of an investigation into claims of discrimination/harassment in the workplace, or opposed a discriminatory practice, is prohibited by this policy.

N.J.A.C. 4A:7-3.1(i) provides that the burden is on the complainant to articulate a sufficient nexus between the alleged conduct to a protected category pursuant to the State Policy.

N.J.A.C. 4A:7-3-2(i) provides that at the EEO/AA Officer's discretion, a prompt, thorough, and impartial investigation into the alleged harassment or discrimination will take place.

N.J.S.A. 11A:2-24 and *N.J.A.C.* 4A:2-5.1(a) provides that an appointing authority shall not take or threaten to take any reprisal action against an employee in the career, senior executive or unclassified service in retaliation for an employee's lawful disclosure of information on the violation of any law or rule, governmental mismanagement or abuse of authority.

N.J.A.C. 4A:2-5.2(a) provides that an employee may appeal a reprisal or political coercion action to the Commission within 20 days of the action or the date on which the employee should reasonably have known of its occurrence.

N.J.A.C. 4A:2-1.4(c) provides that the burden of proof shall be on the appellant.

Initially, it is noted that the appeal concerns the EED determinations that C.H.'s complaints did not touch State Policy. Specifically, C.H. alleged retaliation and harassment due to his acting as a "whistleblower." When considering the complaint, the EED considered whether the complainant articulated a sufficient nexus between the alleged conduct and a protected category as set forth in *N.J.A.C.* 4A:7-3.1(a). *See also*, *N.J.A.C.* 4A:7-3.2(i). However, C.H. acknowledges that a "whistleblower" is not listed as a protected category under *N.J.A.C.* 4A:7-3.1(a), and he did not allege that he was retaliated against for filing a prior State Policy complaint. *See N.J.A.C.* 4A:7-3.1(h). Moreover, the EED does not have the authority to investigate complaints that are not based on one's membership in a protected class

as defined by the State Policy. Therefore, the EED correctly determined that it could not substantiate C.H.'s allegations under the State Policy.

However, the Commission accepted the appeal as an allegation of reprisal. *See N.J.A.C. 4A:2-5.1 and See N.J.A.C. 4A:2-5.2.* In general, to present a *prima facie* case of reprisal, an appellant must satisfy the "Wright Line" test articulated by the New Jersey Supreme Court in *Matter of Bridgewater Tp.*, 95 N.J. 235 (1984), which states that an appellant has the burden of showing that he was engaged in a protected activity, that the employer knew of the activity and was hostile to it and that such activity or disclosure of information was a substantial motivating factor in the appointing authority's action against the employee. Only after such a showing by an appellant does the appointing authority bear the burden of showing that the action taken was not retaliatory. *See also, Wright Line*, 251 NLRB 1083 (1980); *Mount Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 279 (1977); *In the Matter of Jadwiga Warwas* (MSB, decided February 27, 2008).

In this matter, the EED did investigate C.H.'s CEPA claim that R.S engaged in retaliatory conduct against him for whistleblowing regarding allegations that Corrections violated labor laws and engaged in various forms of unethical conduct. However, the EED was unable to substantiate those claims as the one witness that C.H. provided did not confirm the allegations and he provided no other witnesses, documents or any other evidence to confirm that C.H.'s "whistleblowing" was a substantial factor in any actions taken against him. It is noted that C.H. states that R.S. would brag to other employees that he is manipulating the schedule against him, would curse at other Communication Officers who impartially assigned him various job posts and would make false statements about him to others; yet he has not presented these other employees who were allegedly on the receiving end of R.S.'s brags, curses and false statements. Therefore, as there is no evidence in this matter other than C.H.'s statements, mere speculation, without evidence, is insufficient for finding that C.H. presented a *prima facie* case of reprisal.

ORDER

Therefore, it is ordered that this petition be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF JULY, 2021

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